

CHAPTER THREE

Legislation from the 82nd Session

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During the regular legislative session in 2011, lawmakers considered 978 bills that had the potential to affect the programs and activities of the Texas Commission on Environmental Quality. Of those, about 240 bills were passed and signed into law.

One measure in particular, the agency's Sunset legislation, created many new and enhanced duties for agency employees. Divisions throughout the agency spent a year or more drafting new rules, creating new programs, revising existing requirements, and updating print and online documents.

This chapter summarizes some of the key legislation resulting from the 82nd Legislature.

HB 2694 TCEQ Sunset Review

The Sunset Advisory Commission (SSAC) began its review of the TCEQ in September 2009. The overall purpose of a Sunset review is to determine whether an agency should continue to operate, while also evaluating how it manages its programs, fulfills its mission, and responds to its customers.

After completion of the review in January 2011, the SSAC commissioners adopted recommendations that became the basis of the introduced version of the TCEQ Sunset legislation, House Bill 2694. The legislation, co-sponsored by State Rep. Wayne Smith, chairman of the House Environmental Regulation Committee, and State Sen. Joan Huffman, included a recommendation to continue the agency until 2023, the maximum-allowed 12 years.

HB 2694 addressed a wide range of issues affecting many areas of the agency. In addition, some programs were transferred.

gram (nine FTEs) to the Railroad Commission of Texas and absorbing the duties of the now-abolished Texas On-site Wastewater Treatment Research Council.

Overview

The adopted version of HB 2694 included not only the recommendations that originated with the SSAC, but also expansions of some of those recommendations, as well as other issues that arose outside of the SSAC recommendations.

SSAC recommendations:

- Transfer the TCEQ surface casing program to the Railroad Commission.
- Increase the statutory maximum for environmental penalties.
- Require the TCEQ to adopt in rule a general enforcement policy.
- Expand the use of Supplemental Environmental Projects by local governments.
- Require the agency to review water basins that do not have a Watermaster Program.
- Establish a central point of contact in the executive director's office to provide public assistance and education.
- Establish additional requirements for water use reports.
- Require the distribution of electronic copies of water rate applications.
- Require the commission to develop public interest factors for use by the Office of Public Interest Council.
- Repeal three water-related fees.

SSAC recommendations that were expanded:

- Clarify the executive director's authority to curtail water.
- Revise the Compliance History Program.
- Modify the Dam Safety Program.
- Revise the activities and fees governing the remediation program for leaking petroleum storage tanks.

Issues that did not originate as SSAC recommendations:

- Establish requirements for permits to comply with federal Maximum Achievable Control Technology (MACT).
- Allow e-mail notification for water utility rate changes and statements of intent.
- Change the Contested Case Hearing process.
- Establish deadlines for the TCEQ review of the water management plan submitted by the Lower Colorado River Authority.
- Revise requirements for annual financial reports filed by water districts.

Implementation

To implement the many and varied provisions of HB 2694, the agency undertook both rulemaking and non-rulemaking activities. Included in these efforts was development of 11 separate rule packages, along with non-rulemaking activities such as procedural and operational changes and revisions to various guidance documents.

Rulemaking Packages

MACT Permit Procedures, adopted February 2012

- Provides for a public hearing and submission of public comment on permit

amendment applications from electric generating facilities to solely comply with the federal Maximum Achievable Control Technology (MACT) requirements to regulate mercury emissions.

- Provides specific timelines for issuance of the MACT-related permit.

Changes to the Petroleum Storage Tank (PST) Program, adopted March 2012

- Reinstates common carrier liability to prevent delivery or deposit of any regulated substance into underground storage tanks that have not been issued a delivery certificate by the TCEQ.
- Expands the use of the PST remediation fee to remove underground or above-ground storage tanks, under certain criteria.
- Reauthorizes the PST remediation fee, with no expiration date.
- Authorizes the commission to set fees in rule, based on appropriation amounts.

Authority to Suspend or Adjust Water Rights, adopted April 2012

- Authorizes the executive director, during a "period of drought or other emergency shortage of water," to temporarily suspend a water right and adjust the diversion of water between water right holders.
- Actions taken by the executive director must maximize the beneficial use of water, minimize the impact on water right holders, and prevent the waste of water.

Changes to the Contested Case Hearing Process, adopted April 2012

- Allows that a state agency may submit comments to the TCEQ but may not contest the issuance of a permit or license by the commission. "State agency" does not include a river authority.
- Requires the executive director to participate as a party in contested case hearings.
- Provides that for a hearing using pre-filed testimony at the State Office of Administrative Hearings, all discovery must be completed before the deadline for the submission of that testimony.

Public Interest Factors for the Office of Public Interest Counsel (OPIC), adopted May 2012

- Requires the commission to define, by rule, factors that OPIC will consider in representing the public interest.

Revision to the Compliance History Program, adopted June 2012

- Clarifies that the standards for compliance history must ensure consistency and that the commission can consider differences among regulated entities in developing compliance history standards.
- Allows the use of a Notice of Violation as a component for compliance history for only one year from date of issuance of the NOV.
- Requires that the compliance history classification consider the size and complexity of the site and the potential for the violation to occur at the site that is attributable to the nature and complexity of the site.

Incentives Program, adopted June 2012

- Allows for an alternative process for the control or abatement of pollution if this process is demonstrated to be as protective of the environment and public health as the method required by statute or agency rule.

Texas On-site Wastewater Treatment Research Council, adopted July 2012

- Abolishes the TOWTRC.
- Requires revenue from the On-site Wastewater Treatment permit fee to be deposited in the TCEQ's Water Resource Management Account.

Water Reporting Requirements; Water Fee Repeals, adopted August 2012

- Raises from \$100,000 in gross receipts to \$250,000 the basis for when a water district can opt to submit a financial report instead of an audit.
- Adds aquaculture to the definition of agriculture.
- Eliminates three existing water and wastewater utility application fees: rate

changes, certificate of convenience and necessity and sale, and transfer or merger of a CCN.

- Allows e-mail to be used when public utilities and cities send the required notices of a rate change and when members of the public file a statement of intent for a TCEQ review of the rate change.

General Enforcement Policy, adopted August 2012

- Directs the TCEQ to adopt a general enforcement policy by rule.
- Requires the commission to regularly update, assess, and publicly adopt specific enforcement policies.
- Requires those enforcement policies to be available to the public through postings on the website.
- Requires that the agency's enforcement policy include a deterrence to prevent the economic benefit of non-compliance.

Transfer of Surface Casing Program, adoption expected in December 2012

- Transferred the authority for making groundwater protection recommendations regarding oil and gas activities to the Railroad Commission, effective Sept. 1, 2011.
- Updates the memorandum of understanding between the TCEQ and the Railroad Commission to reflect the transfer authority.

Non-rulemaking Activities

Some new laws can be enacted without rulemaking. Instead, they require the agency to carry out various actions such as evaluations, procedural changes, and revisions to existing guidance documents. The following activities were conducted from August 2011 to August 2012 to implement specific provisions in HB 2694.

Dam Safety. Revisions to the agency's Dam Safety Program guidance materials were posted on the agency website to reflect changes for exempted dams and the authority to develop agreements with dam owners.

- Directs the TCEQ to focus on the most hazardous dams in the state.
- Allows the agency to enter into agreements with dam owners regarding adequacy of a dam or spillway, including a timeline to meet safety requirements.
- Requires that a dam owner comply with operation and maintenance requirements.
- Exempts dams on private property from safety regulations if the dam:
 - has less than 500 acre feet of water impoundment,
 - is classified as low or significant hazard (not as high hazard),
 - is located in a county with a population of less than 215,000, and
 - is not located inside the city limits
 (All exemptions expire Aug. 31, 2015.)

Penalty Policy. The commission adopted changes to the Penalty Policy to reflect the following:

- Increase the maximum fines to \$25,000 for all penalties, except in several specified areas of jurisdiction.
- Increase the maximum fines to \$5,000 for penalties related to occupational licensing, on-site sewage disposal, performance standards for plumbing fixtures, used oil program, and irrigators.
- Allows the commission to assess penalties not greater than \$5,000 for water rate-related violations.

Compliance Supplemental Environmental Projects (SEPs). The commission provided direction for the development of language for a guidance document to implement Compliance SEPs.

- Allows local governments to apply penalty money assessed by the commission toward the cost of compliance in the form of a SEP.

Water Use Reports. A January 2012 mailing to all water right holders included notification that under certain circumstances, the agency can request monthly water use reports.

- Requires water right holders to maintain monthly water use reports and make this information available to the agency, upon request.
- Allows the agency to request the monthly water use reports during a drought or emergency water shortage or, if needed, to respond to a complaint.

Public Education Program. Public assistance related to the TCEQ's permitting programs was transferred to the Small Business and Environmental Assistance Division.

- Requires the agency to offer a centralized point of contact for information, and to assess and respond to public concerns.

Petroleum Storage Tanks (PSTs).

The agency established a new program to issue direct awards for PST cleanup activities.

- Creates a process to develop PST remediation contracts so that contractors currently cleaning PST sites, which have been eligible for reimbursement, may continue their work.

Water Rates. The agency posted online documents reflecting the changes associated with water rate applications.

- Directs the agency, when provided an electronic copy of a water rate case, to make it available to the public at a reasonable cost.

Office of Public Interest Council (OPIC).

Enforcement and permit notice letters were revised to reflect the statutory changes in OPIC's duties in representing the public interest before the commission.

- Requires OPIC to develop an annual report, including legislative recommendations and information on the development of performance measures. (See Appendix C for "OPIC's Annual Report to the TCEQ.")

Watermaster Program. The agency will perform evaluations and report the findings.

- Requires the TCEQ, at least once every five years, to evaluate the water basins that do not have a watermaster program and determine whether a program should

be established. (See Appendix D for "Evaluation of Water Basins Without a Watermaster.")

HB 1981 Air Pollutant Watch List

The TCEQ maintains the Air Pollutant Watch List (APWL) to identify each contaminant and each geographic area at which ambient monitoring has indicated the potential for short-term or long-term adverse human health effects.

The TCEQ had drafted protocol to provide a framework for adding areas to, and removing areas from, the Watch List. HB 1981 codified the TCEQ's APWL program and provided procedural clarifications for the APWL process. It also established a new requirement for the TCEQ to provide information on air monitoring data to applicable legislative officials when proposing to add, or remove, an area on the APWL.

HB 1981 also clarified the TCEQ's emissions event reporting requirements. While the agency was already required to do annual assessments and reports on emissions events, the agency will also provide the information to legislators, upon request. In addition, this information will be entered into an online database that can be searched by the public.

The law further requires the TCEQ to notify legislators within four hours of a dangerous environmental incident occurring in their district. While it was already the TCEQ's practice to notify lawmakers of significant events that might affect constituents, HB 1981 provided a statutory framework and deadline for doing so. During fiscal 2012, eight environmental events took place that required immediate notification of legislators. In each instance, staff initiated phone calls and e-mails, describing the nature of the incident and the response by the TCEQ.

SBs 20 and 385 Grant Programs for Natural Gas and Other Alternative Fuels

New grant programs were established under the Texas Emissions Reduction Plan (TERP) to fund incentives for replacing gasoline

and diesel vehicles with natural gas vehicles and to create fueling infrastructure for natural gas and other alternative fuels.

- The **Clean Transportation Triangle** helps fund new natural gas fueling facilities on interstate highways connecting Houston, Dallas-Fort Worth, and San Antonio (see map at <www.tceq.texas.gov/assets/public/implementation/air/terp/ctt/CTT_Map.pdf>). The program pays the following: up to \$100,000 for a compressed natural gas facility, up to \$250,000 for a liquefied natural gas facility, and up to \$400,000 for a facility providing both forms of natural gas. After the first grant round closed in April 2012, 15 applications were selected for grants totaling \$3.1 million. With a biennial allocation of \$4.6 million, the program planned another round of grants in early fiscal 2013 to award the remaining funds.
- The **Texas Natural Gas Vehicle Grant Program** makes grants avail-

able for replacing heavy- and medium-duty gasoline and diesel vehicles with vehicles powered by natural gas. The vehicles must be operated for four years or 400,000 miles (whichever occurs first) in the state's nonattainment areas and in the counties along the corridors designated in the Clean Transportation Triangle (see map at <www.tceq.texas.gov/assets/public/implementation/air/terp/tngvvp/TNGVGP_Map.pdf>). The application period opened in July 2012, and will remain open through May 2013 or until all of the \$18.3 million biennial allocation has been awarded.

- The **Alternative Fueling Facilities Program** funds up to 50 percent of the eligible costs or \$500,000 (whichever is less) for fueling facilities that provide compressed or liquefied natural gas, biodiesel, propane, hydrogen, electricity, or fuels containing at least 85 percent methanol by volume. Eligible projects must be located in the state's designated nonattainment areas. The first application

period ran from May through July 2012, with awards planned for early fiscal 2013. This program was allocated \$2.3 million for the biennium.

SB 527 New Air Monitoring Program Approved for the Regions of Dallas- Fort Worth and Abilene

With the continuing natural gas activities in the North Texas area—specifically in the Barnett Shale geological area, the Legislature moved to augment the agency's air monitoring activities in the Dallas-Fort Worth area (TCEQ Region 4) and the Abilene area (TCEQ Region 3).

This Senate bill allocated up to \$7 million annually for 2012 and 2013, and up to \$3 million in 2014 and each subsequent fiscal year to fund this new regional air monitoring program. The funding comes from the Texas Emissions Reduction Plan.

The new program is being implemented under the TCEQ's oversight, with the agency providing direction on the number, types, locations, and operations of the new monitors, as well as data validation practices.

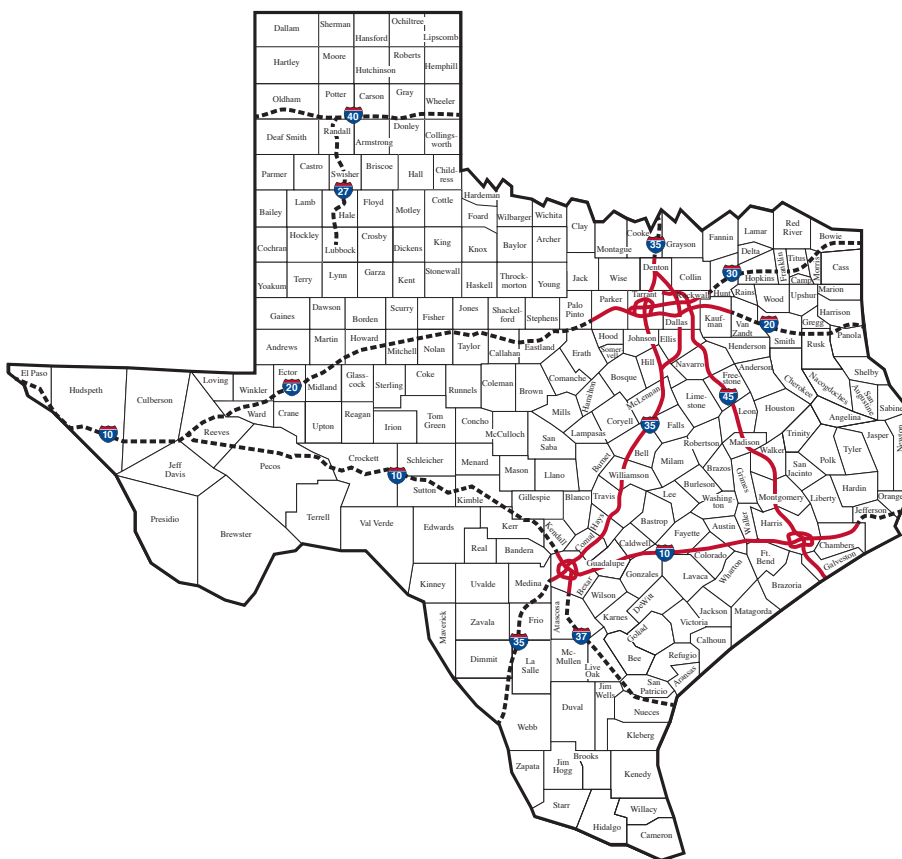
SB 527 directed that the program be executed by a regional nonprofit entity, which is located in North Texas and has representation from counties, municipalities, higher education institutions, and private sector interests across the area.

In consultation with the North Central Texas Council of Governments, the TCEQ reviewed a number of entities to determine which could meet the eligibility requirements. The North Texas Commission (NTC) was approved for the project in September 2011.

NTC assembled a monitoring committee comprised of local municipalities, higher education, and private sector interests in the region to aid in development of the monitoring program. NTC then hosted monitoring committee meetings from March to June 2012 to formulate a monitoring proposal for the TCEQ to review and approve.

In the fall of 2012, the first SB 527 monitoring site was installed on the campus of the University of Texas at Arlington.

Texas Clean Transportation Triangle



Installation of additional air monitoring sites throughout the DFW and Abilene regions was due to begin by the end of 2012, with the entire network scheduled for completion by the summer of 2013.

SB 1134 Oil and Gas Permitting Requirements

The TCEQ is now prohibited from promulgating new authorizations for the oil and gas industry, or amending existing ones, without performing a regulatory impact analysis in accordance with the Government Code. The agency also must evaluate relevant air monitoring data, develop correlated air quality modeling to determine whether emissions limits or emissions-related requirements are necessary, and consider whether the requirements should be imposed on a particular geographic region of the state.

In addition, SB 1134 moved the deadline for filing applications seeking to authorize maintenance, startup, and shutdown activities from January 2012 to January 2014.

The agency adopted one rulemaking project on Oct. 31, 2012 that was partially affected by SB 1134. Specifically, the commission adopted the following revisions to the Barnett Shale permit by rule: removed eight counties from the Barnett Shale requirements, and extended the date for notifying the TCEQ about the location of wells and other facilities, as well as their methods of authorization, from Jan. 1, 2013, to Jan. 5, 2015.

Only portions of SB 1134 were triggered by this rulemaking, because no new emissions-related requirements were adopted.

SBs 1605 and 1504 Texas Low-Level Radioactive Waste Disposal Compact Commission

SB 1605 clarified that the Texas Low-Level Radioactive Waste Disposal Compact Commission (TLLRWDC) is an independent

entity and not a program, department, or other division of the TCEQ.

The TLLRWDC is required to submit biennial reports to the Legislature, be represented in legal matters by the state attorney general, and be subject to audits by the state auditor. Furthermore, the TLLRWDC is subject to the Sunset Act as if it were a state agency, except that it may not be abolished.

The bill also set the service of the eight TLLRWDC commissioners (six from Texas and two from Vermont) as staggered six-year terms. The terms of two Texas commissioners expire September 1 of each odd-numbered year. Texas and Vermont are the two states that belong to the Texas Low-Level Radioactive Waste Disposal Compact.

SB 1504 required the TCEQ, in coordination with the TLLRWDC, to adopt rules establishing criteria and thresholds by which incidental commingling of waste from the Compact and waste from other sources at a commercial processing facility is reasonably limited. The bill also implemented a statutory prohibition on the acceptance of waste of international origin. The TCEQ rules took effect in June 2012.

SB 1504 further directed the TCEQ to conduct three legislative studies regarding the Compact waste disposal facility in West Texas, and submit them by Dec. 1, 2012. The topics are:

1. Capacity. Examine the available volume and curie capacity of the Compact waste disposal facility for the disposal of state Compact waste and non-Compact waste.
2. Financial assurance. Review the adequacy of the financial assurance for the low-level radioactive waste site.
3. Surcharge revenue. Examine the assessment of surcharges for the disposal of non-Compact waste at the Compact waste disposal facility.

SB 1504 further required the TCEQ executive director to establish interim disposal rates for state Compact waste, which are only effective until the final rates are adopted by rule. It also provided for the importation of non-Compact waste at the low-level radioactive waste facility and established a 20 percent surcharge.

The Texas Health and Safety Code was amended to address the issue of timing, in case the Compact waste disposal fee schedule goes through a contested case hearing. The fee schedule must be established no later than one year after the State Office of Administrative Hearing (SOAH) assumes jurisdiction of a case. Otherwise, the low-level radioactive waste disposal facility must cease operations until the rates are adopted by rule.

In early 2012, the TCEQ filed and published the licensee's Compact waste disposal rate application. Seven Texas generators requested that the application be referred to SOAH for a contested case hearing. SOAH assumed jurisdiction in June 2012, which triggered the one-year period for the fee schedule. The contested case hearing is planned for Feb. 20, 2013.

SB 329 TV Recycling

For several years, the TCEQ has helped consumers find free options to recycle their old computers and related equipment. SB 329 created a television-equipment recycling program that is separate from—and more extensive than—the computer recycling program. The new program requires TV manufacturers to offer consumers free collection, reuse, and recycling opportunities for television sets.

Under TCEQ rules, manufacturers must register with the agency each year, beginning Jan. 31, 2013. Manufacturers choosing not to participate in a Recycling Leadership Program will face additional annual requirements, including paying a fee and reporting the results of their collection and recycling efforts.

Participation in a Recycling Leadership Program will exempt manufacturers from some requirements. This program must submit annual information to the TCEQ about its TV collection and recycling plans, and create public education programs on the available options for the collection, reuse, and recycling of TVs.

Retailers in Texas are required to provide consumers written information on the proper and legal ways to recycle or dispose of

television equipment. Beginning April 1, 2013, retailers may only sell televisions from manufacturers that are on the TCEQ's list of manufacturers, which demonstrates they are authorized to sell TVs in Texas. The list will be available at <www.TexasRecyclesTVs.org>.

Recyclers must follow specific standards for management of collected television equipment and complete the TCEQ's annual registration and reporting.

HB 571 **Aggregate Production Operations**

Aggregate production in Texas encompasses dirt, sand, and rock quarries and their processing plants. HB 571 created a program for registration and inspection of these operations.

Aggregate production operations are required to register with TCEQ each year

and pay a fee. The initial registration period was held from Sept. 1 to Oct. 30, 2012.

The agency structured registration fees on four tiers, using the disturbed acreage as the basis for the each tier. The fees range from \$200 to \$900, with a 25 percent reduction when submitted electronically. Fees will be adjusted annually.

Also the TCEQ will conduct compliance inspections of each operations site once every three years. For entities that submitted a notice of audit for compliance during the initial registration period, routine inspections of the operation will not begin until Sept. 1, 2015.

SB 341 **Bexar Metropolitan Water District**

The TCEQ was directed to conduct an evaluation of the Bexar Metropolitan Water

District (BexarMet). At the same time, the water district was required to hold an election to determine whether it should remain in place or be dissolved and merged with the San Antonio Water System (SAWS).

In November 2011, voters in BexarMet elected to dissolve the water district and merge with SAWS. After the Justice Department reviewed the election, SAWS began operating the water district in January 2012.

The TCEQ's executive director executed a master assignment to transfer and assign all assets and liabilities to SAWS. After the transfer was formally acknowledged by SAWS, the TCEQ proceeded in May 2012 to dissolve the district.

The TCEQ's evaluation, which began in mid-2011, was approved by the agency's executive director in August 2012. SAWS will have five years to integrate all the BexarMet systems.